Supreme Court, U.S.
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No.

In the Supreme Court of the United States

CARSON CONCRETE CORPORATION;
CARCO CONSTRUCTION CORPORATION,
Petitioners,

v.

SECRETARY OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The administrative law judge entered a default judgment against Petitioners in the amount of $176,000. He defaulted Petitioners, which had been cited for violations of the Occupational Safety and Health Act of 1970, as a sanction for their purportedly "contumacious" withdrawal from a scheduled evidentiary hearing after being denied a thirty day continuance to allow newly-retained counsel sufficient time to prepare. The administrative law judge did not consider, and made no findings, whether a lesser sanction might have been appropriate. The court of appeals affirmed.

The questions presented are as follows:

1. Does an administrative law judge abuse his discretion by failing to consider lesser sanctions before entering default judgment as a sanction?

2. Were Petitioners' due process rights infringed?

3. Can a finding of contumaciousness be predicated upon a single incident of dilatory conduct?

RULE 14.1(b) STATEMENT

The parties to the proceeding in the administrative tribunal whose judgment is the subject of this petition are as follows:

Respondent-Appellant Carson Concrete Corporation

Respondent-Appellant Carco Construction Corporation

Complainant-Appellee Elaine L. Chao, Secretary of Labor, United States Department of Labor

RULE 29.6 STATEMENT

Petitioners have no parent corporation, and no publicly held company owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Carson Concrete Corporation ("Carson") and Carco Construction Corporation ("Carco") respectfully petition for a writ of certiorari to review judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, 3a) is unreported. The order of the court of appeals denying Carson's petition for rehearing (App., *infra*, 1a) is unreported. The decision and order of the administrative law judge (App., *infra*, 14a) is unreported. The notice and final order of the Occupational Safety and Health Review Commission (App., *infra*, 12a) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on February 27, 2006. An order denying Carson's petition for rehearing was entered on June 22, 2006. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

[1] Throughout the appellate process, Carco has not raised any issues separate from those raised by Carson. Following this convention, the Petitioners will be referred to collectively as Carson.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 C.F.R. Section 2200.62 Postponement of hearing.

(a) *Motion to Postpone.* A hearing may be postponed by the Judge on his own initiative or for good cause shown upon the motion of a party. A motion for postponement shall state the position of the other parties, either by a joint motion or by a representation of the moving party. The filing of a motion for postponement does not automatically postpone a hearing.

(b) *Grounds for postponement.* A motion for postponement grounded on conflicting engagements of counsel or employment of new counsel shall be filed promptly after notice is given of the hearing, or as soon as the conflict is learned of or the engagement occurs.

(c) *When motion must be received.* A motion to postpone a hearing must be received at least seven days prior to the hearing. A motion for postponement received less that seven days prior to the hearing will generally be denied unless good cause is shown for late filing.

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C.F.R. Section 2200.41 Failure to obey rules.

(a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as

required by the commission of Judge, he may be declared to be in default either:

(1) On the initiative of the commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or

(2) On the motion of a party. Thereafter, the commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

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STATEMENT

The administrative law judge below entered a six-figure default judgment against Carson after it withdrew from an evidentiary hearing because it lacked representation. The thirty day continuance sought by Carson so that its newly-retained counsel could familiarize himself with the file was the first and only continuance Carson had sought during the entire pendency of the case. The administrative law judge perceived that Carson's request and withdrawal were wilfully dilatory and "contumacious" and did not consider any lesser sanction as an alternative. Long-standing precedents throughout the circuit courts of appeal (including the Third Circuit) have consistently required that before such an ultimate sanction is meted out by a trial level court, it must consider lesser sanctions and make findings so that its decision can be meaningfully reviewed. In this case, however, the Third Circuit affirmed, stating in a footnote that, an administrative law judge is not required to consider lesser sanctions where a litigant refuses to participate in a scheduled evidentiary hearing. The court's holding creates an exception

to a well-established rule of law that places it at odds with its sister-circuits. It also affords trial level courts, at least in the Third Circuit, a level of discretion that would effectively allow for abuse of due process rights in the name of expediency to go unchecked. Due process is a bedrock principle of our system of law. This case presents an issue of significant importance.

Factual Background. The Secretary alleged that Carson violated OSHA safety standards at a job site in Philadelphia and sought $176,000 in fines and penalties. After Carson asserted that the Secretary had cited the wrong employer, the complaint and citations were amended to include Carco Construction Corporation. An evidentiary hearing was set by the administrative law judge for November 16, 2004. At a meeting on November 9, 2004 to prepare for the hearing a dispute arose between Carson's president, Anthony Samango, and its representative, James Sassaman, over admissions that Sassaman had made on Carson's behalf when answering the Secretary's requests for admissions. Sassaman admitted the underlying OSHA violations but denied any employment relationship between Carson and the workers exposed to the job-site conditions. Samango contended that he had never authorized Sassaman to admit the underlying violations. Samango directed Sassaman to withdraw his appearance and to attempt to obtain a continuance of the hearing so that it could retain other representation. On November 12, 2004, Sassaman filed a motion to withdraw and requested a thirty day continuance. The administrative law judge denied both requests that same day.

At the hearing, new counsel entered an appearance for Carson and renewed Carson's request for a thirty day continuance. The administrative law judge heard testimony from Samango and Sassaman, credited Sassaman's testimony

that Samango had been timely made aware of the admissions, and denied Carson's motion. At that point, Carson faced a classic "Hobson's" choice: proceed at the hearing with Sassaman, in whom it had lost confidence, as its representative; proceed with its newly retained counsel, who had not yet had an opportunity to .eview the file, let alone prepare for a hearing; proceed *pro se*, or, withdraw from the hearing. Carson elected to withdraw. When it did, the Secretary moved for dismissal of Carson's Notice of Contest (the equivalent of its answer). The administrative law judge granted the motion.

On January 4, 2004, the judge forwarded his Decision and Order to the parties. He stated that "[g]ranting Respondent's motion for a continuance would necessitate additional discovery and would unduly delay the hearing in this case; granting the motion also had the *potential* of prejudicing the Secretary's case." (App., *infra*, 27a.) He acknowledged that he *"did not find actual prejudice,"* but felt that delaying the hearing carried the *potential* for prejudice because the Secretary "could not count on" the availability of its witness (the OSHA compliance officer) in a month's time. (App., *infra*, 27a, n.6.)[2] The judge entered judgment against Carson in the amount of $176,000 (the amount that had been requested by the Secretary) pursuant to 29 C.F.R. 2200.41,

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[2] At the hearing, counsel for the Secretary suggested that the compliance officer might need to undergo back surgery in the near future; in response, Carson's attorney suggested that the compliance officer's testimony could be videotaped for presentation at a continued hearing – a commonplace occurrence that would have ameliorated any potential for prejudice.

which is analogous to F.R.C.P. 41(b).[3] In doing so, the judge purported to balance two interests: Carson's "strong interest in adjudicating its case on the merits," and the Commission's "strong interest in preserving the integrity of its orders as well as deterring future misconduct." (App., *infra*, 28a.) He concluded that Carson's "belated" request for a continuance was "contumacious," and thus justified the sanction that he imposed. (App., *infra*, 28-29a.)

The administrative law judge did not consider whether a lesser sanction might be appropriate.[4] Carson petitioned the O.S.H.R.C. for discretionary review of the judge's decision, which the Commission declined to direct. Carson then took a timely appeal to the Third Circuit Court of Appeals. On February 27, 2006, the Third Circuit affirmed the order of the Commission, and entered judgment against Carson. In its Opinion, the Court held that :

- "an ALJ is not required to consider lesser sanctions where a litigant refuses to participate in a scheduled evidentiary hearing" (App., *infra*, 10a, n.7);

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[3] Rule 41(b) provides, in pertinent part, as follows:

> **Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant ....

[4] Like, for instance, continuing the hearing for a brief period, conditioned upon: (i) the continued hearing being limited to the issues of whether the workers exposed to the conditions were Petitioner's employees and the appropriateness of the monetary sanction; and (ii) Carson paying any costs associated with the need for video-taping the hearing testimony of the compliance officer.

- Carson's due process rights had not been infringed because it was afforded an opportunity to be heard "at a meaningful time and in a meaningful manner" and "was represented by counsel of its choice" (App., *infra*, 9a); and

- there was a "pattern of misconduct" in Petitioner's last-minute disavowal of the admissions and consequent refusal to proceed with the hearing that represented "an attempt to delay proceedings and expand the scope of contested issues" and was "contumacious." (App., *infra*, 10a.)

On April 12, 2006, Carson filed a petition for rehearing en banc or reconsideration, which was denied on June 22, 2006. (App., *infra*, 1a.)

REASONS FOR GRANTING THE PETITION

I. THE RULING BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL (AND PRIOR THIRD CIRCUIT DECISIONS).

Prior to this case, the Third Circuit had "time and again reiterated" that:

> "[I]n exercising our appellate function to determine whether the trial court has abused its discretion in dismissing, or refusing to lift a default, we will be guided by the manner in which the trial court balanced [certain enumerated] factors." The applicable factors that the district court must consider are: (1) whether lifting the default would prejudice the plaintiff; (2) whether the defendant has a *prima facie* meritorious defense; (3) whether the defaulting defendant's

> conduct is excusable or culpable; and the effectiveness of alternative sanctions. In order that we may properly exercise our function of reviewing for abuse of discretion, we have further required the district court to make explicit findings concerning the factors it must consider in rendering judgment by default or dismissal, or in declining to reopen such judgment.

Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73-4 (3d. Cir. 1987) (internal citations omitted). In the "parallel context" of a dismissal for failure to prosecute a claim, the court has likewise consistently required consideration of lesser sanctions. In *Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 873 (3d Cir. 1994), for example, the court vacated a dismissal of plaintiff's claims and remanded for imposition of a lesser sanction. *Id.* at 876. In *Titus v. Mercedes Benz*, 695 F.2d 746 (3d Cir. 1982), the district court dismissed the case when the plaintiffs repeatedly failed to prepare a draft pre-trial order. The court held that the district court was required to consider sanctions other than dismissal and record its findings. *Id.* at 750-1. In this regard, the court's jurisprudence has been consistent with that of its sister circuits. *E.g.*, *Jackson v. City of New York*, 22 F.3d 71, 76 (2d Cir. 1994) (reversing dismissal when, among other things, there was no indication in the record that the trial court had considered a lesser sanction for failure to obey pre-trial orders); *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (trial court must determine if lesser sanctions would prompt diligence); *Cohen v. Carnival Cruise Lines, Inc.*, 782 F.2d 923, 925 (11th Cir. 1986) (trial

court abused its discretion by not considering lesser sanctions).[5]

McNeal v. Papasan, 842 F.2d 787 (5th Cir. 1988) is a remarkably similar case illustrating that even when a litigant refuses to participate in a hearing or trial a court must nonetheless consider lesser sanctions than dismissal or default. In *McNeal*, two weeks before trial the plaintiff asked her attorney to withdraw and seek a continuance of the trial date. Three days before trial the attorney called the judge and attempted to do so. The judge refused both requests. On the day of trial, plaintiff's attorney formally presented a motion to withdraw, and the court granted it. The plaintiff then requested a continuance so that she could obtain counsel to represent her, which the court denied. The plaintiff that she had found it necessary to discharge her attorney at such a late date because she had become dissatisfied with his services. The court was unmoved and, expressing concern about the expense and effort to which the defendant and the court had been put, he dismissed her claims when she declined to proceed. The Fifth Circuit vacated the dismissal and remanded for the district court to, *inter alia*, determine whether granting a continuance conditioned on assessing plaintiff with the costs to which the defendants had been put as a result would have better served the ends of justice. *Id.* at 793-4.

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[5] Commission precedent has followed suit. *E.g.*, *Secretary of Labor v. Architectural Glass & Metal Co., Inc.*, 19 O.S.H. Cas. (BNA) 1881, 2001 WL 1041005, *2-3 (Sept. 6, 2001) (administrative law judge must not impose a sanction that is too harsh under the circumstances of the case; reviewing courts universally recognize the harshness of dismissal with prejudice and generally require that lesser sanctions first be considered).

In the case at bar, the administrative law judge did not consider any sanction other than entering default judgment against Carson. The judge could, for instance, have continued the hearing for a brief (30 day or less) period of time, conditioned upon payment of costs by Carson and the continued hearing being limited to the issues of whether the workers exposed to the conditions alleged by the Secretary were Carson's employees, and the appropriateness of the monetary sanction sought. In affirming, the court of appeals, without citation or other explanation, stated that "an ALJ is not required to consider lesser sanctions where a litigant refuses to participate in a scheduled evidentiary hearing." (App., *infra*, 10a, n.7.) The court's ruling conflicts with other circuits and its own well-established precedent, and allowed the administrative law judge to ride roughshod over Carson's due process rights in a case with very serious financial and other business-related ramifications.

II. CARSON'S DUE PROCESS RIGHTS WERE INFRINGED.

The Commission's role is essentially that of a court. *Martin v. O.S.H.R.C. and CF&I Steel Corp.*, 499 U.S. 144, 155 (1991); *Secretary of Labor v. Oscar Renda Contracting, Inc.*, 17 O.S.H. Cas. (BNA) 1883, 1997 WL 37057, *6 (Jan. 29, 1997). Chief among its obligations in this role is the function, inherent in our courts, of promoting justice and assuring fundamental fairness in proceedings before it. *Oscar Renda*, *6. Of course, an inquiry into "fairness" is not susceptible to mathematical precision, as it includes examination of elements that may be both intricate and variable. *Id.* As the court stated in *Rogal v. American Broadcasting Companies, Inc.*, 74 F.3d 40, 44 (3d. Cir. 1996), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972):

> We have repeatedly emphasized that the requirements of due process are not reducible to a static formula, but rather are sensitive to the facts and circumstances of a given case. While "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner [,] the concept is flexible, calling for procedural protection as dictated by the particular circumstances."

These sliding scales are precisely why it is so important that, before a trial level court enters a default judgment or dismisses a claim as a sanction, it must consider whether a lesser sanction might be more appropriate and make findings supporting its determination so that an appellate court may conduct a reasoned review.

We depend upon the adversary system as the best means of arriving at a just result. Ordinarily, that entails both sides being represented by counsel informed on the facts and the law. While it is true that not every denial of a request for more time violates due process, it is equally true that a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Here, the administrative law judge's denial of Carson's motion for continuance was an abuse of discretion and violated Carson's due process rights.

The Commission's own rule regarding postponement of a hearing, C.F.R. Section 2200.62, requires that "good cause" be shown (1) for late filing of a motion for continuance (less than seven days before a hearing) and (2) the continuance itself. Good cause is undefined, but in *Secretary of Labor v. Hern Iron Works, Inc.*, 13 O.S.H. Cas. (BNA) 2186, 1989 WL 223327, *2, n.1 (April 20, 1989), the Commission

acknowledged that substitution of counsel may justify deviation from the seven-day requirement. In our case, the administrative law judge emphasized Carson's late-filing as justification for his denial of a continuance. (App., *infra*, 26a.) This reflected a "myopic insistence upon expeditiousness," as was further demonstrated in his reasoning that allowing a continuance would have "unduly delayed" the hearing and had the "potential" for prejudicing the Secretary's case. (App., *infra*, 27a.) Pointedly, the judge did not articulate why a thirty day continuance might constitute "undue delay" other than to state that it would "necessitate additional discovery." (App., *infra*, 27a.) However, that would only have been a legitimate concern in the event the judge had allowed Carson to withdraw its admissions. *Carson never moved to do so.*[6] As for potential (not actual) prejudice resulting from the compliance officer's possible back surgery, this could easily have been ameliorated by video-taping his trial testimony (as was suggested by Carson's counsel at the hearing) at Carson's expense.[7]

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[6] Even if Carson had, the judge could have denied the request, and at the same time preserved Carson's ability to defend the case and contest the amount of the proposed fines, by granting a continuance while maintaining the admissions concerning the underlying OSHA violations. In that event, at a continued hearing the Secretary would not have had to prove the underlying violations, and thus would not have had to "redo" any discovery.

[7] Moreover if, as one might logically suspect, the compliance officer was present to testify about the underlying violations, the need for his testimony would have been obviated in any event by limiting a continued hearing to Carson's affirmative defense that the workers allegedly exposed to the violative conditions were not its employees.

The judge's ruling presented Carson with a Hobson's choice -- represent itself against the Secretary's serious allegations; go forward with counsel that had not yet seen the pleadings; or go forward with Sassaman. The first two require little discussion; plainly, neither was an option, and neither is consistent with notions of due process. As for Sassaman, there can be little doubt that there was good cause for Carson to doubt his ability to adequately represent its interests. At the hearing Samango and Sassaman each gave conflicting testimony about what had transpired regarding Carson's discovery responses, and while this can best and most easily be explained as the result of a simple failure of communication, each man essentially called the other a liar at the hearing. Proceeding with an antagonistic Sassaman at the helm of its ship in such a serious matter was not a reasonable alternative for Carson. In short, the judge's ruling left Carson with no option but to withdraw. Carson was not afforded an opportunity to be heard in a meaningful manner. This was an abuse of discretion by the administrative law judge and violated Carson's due process rights.

III. CARSON'S WITHDRAWAL FROM THE HEARING DID NOT CONSTITUTE CONTUMACIOUS BEHAVIOR.

In *Gardner v. United States*, 211 F.3d 1305, 1308 (D.C.Cir. 2000), the court held that dismissal is an unduly severe sanction for a single episode of misconduct and should be imposed only after less dire alternatives have been explored.[8] In this case, the administrative process proceeded

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[8] Commission precedent likewise consistently demonstrates that a *pattern* of intentionally dilatory or disrespectful behavior is required before an ultimate sanction like default or dismissal is

smoothly through the pleading and discovery stages on a timetable worked out by the parties. The continuance requested by Carson – undeniably a modest request at thirty days – was the only request for continuance made by Carson. In short, this was not a case where a litigant significantly delayed a merits resolution by consistently dilatory conduct. Indeed, if derailment of the administrative process had truly been Carson's goal, such a brief continuance would hardly have accomplished it. Carson's desire to proceed in this very serious matter properly represented by an individual in whom it had confidence is understandable. The administrative law judge's conclusion that Carson was throwing sand in the gears for the sake of watching the process grind to a very temporary halt makes little sense. In short, the administrative law judge's finding that Carson acted contumaciously is not supported by substantial evidence in the record as a whole.

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appropriately imposed. *E.g.*, *Secretary of Labor v. General Motors Corp. Fisher Body Div.*, 1982 WL 189102 (O.S.H.R.C. Aug. 31, 1982) (pattern of delay throughout the case by the Secretary culminating with a request for continuance the day before the hearing coupled with an extensive and "generally worded" request for production of documents was contumacious); *Secretary of Labor v. Sealtite Corp.*, 15 O.S.H. Cas. (BNA) 1130, 1991 WL 132733 (June 28, 1991) (respondent's failure to cooperate in discovery and consistent failure to file documents required by rules and orders was a pattern indicating that respondent ignored the rules and the judge's orders in order to delay the proceedings indefinitely and was contumacious); *compare Secretary of Labor v. Texas Masonry, Inc.*, 11 O.S.H. Cas. (BNA) 1835, 1984 WL 34800 (Feb. 24, 1984) (45 day delay by Secretary in transmitting notice of contest and filing complaint was not contumacious).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2160

[Filed June 22, 2006]

CARSON CONCRETE CORPORATION;	)
CARCO CONSTRUCTION CORPORATION,	)
Petitioners	)
	)
v.	)
	)
*SECRETARY OF LABOR,	)
Respondent	)
	)

*(Amended Per Clerk's Order of 5/9/05)

Occupational Safety and Health Review Commission
No. 03-2229

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN and ROTH*, Circuit Judges

The petition for rehearing filed by petitioners in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

Dated: 22 June 2006

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* Pursuant to IOP 9.6.4, any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case. The petition was filed prior to Judge Roth assuming senior status. Judge Roth has elected to participate in this matter.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-2160

[Filed February 27, 2006]

CARSON CONCRETE CORPORATION;	)
CARCO CONSTRUCTION CORPORATION,	)
Petitioners	)
	)
v.	)
	)
*SECRETARY OF LABOR,	)
Respondent	)
	)

*(Amended Per Clerk's Order of 5/9/05)

Before: SCIRICA, Chief Judge, BARRY and FISHER, Circuit Judges.

OPINION OF THE COURT

SCIRICA, *Chief Judge*.

Petitioners Carson Concrete Corporation and Carco Construction Corporation challenge an order of the Occupational Safety and Health Review Commission (the

Commission). We have jurisdiction under 29 U.S.C. § 660 and will affirm.

I.

Because we write for the parties, an abbreviated recitation of the facts will suffice. On November 7, 2003, the Secretary of Labor issued citations alleging Carson violated numerous Occupational Safety and Health Administration (OSHA) safety standards at a Philadelphia construction site during summer 2003. After Carson asserted the citations named the wrong employer, the Secretary of Labor amended them to include Carco Construction Corporation, whom Carson identified as the correct employer.[1]

In February 2004, the Secretary of Labor served Carson with interrogatories, document requests, and requests for admissions. The requests for admissions asked Carson to admit that the individuals identified in the citations were employed by Carson and had been exposed to the alleged hazards. Through its representative, James Sassaman, Carson admitted the alleged violations, but denied an employment relationship with the identified individuals. In August 2004, the Secretary of Labor filed a motion to conclusively establish Carson's responses to the requests for admissions. Carson did not object, and the ALJ granted the motion. Meanwhile, on June 29, 2004, the ALJ set an evidentiary hearing date of November 16, 2004.

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[1] Carco Construction Corporation does not raise any issues in this appeal separate from those raised by Carson. Following the convention of the parties, we refer to the petitioners collectively as "Carson."

On November 9, 2004, Sassaman met with Anthony Samango, Carson's president, to prepare for the hearing. Samango later testified that just prior to this meeting, he realized for the first time that Carson had admitted the underlying violations. Sassaman, in contrast, testified he and Samango had discussed the admissions in April. Sassaman further testified he had copied Samango on all filed discovery responses. At the November 9 meeting, Samango disavowed the admissions. He instructed Sassaman to obtain a continuance of the hearing and to withdraw as Carson's counsel.

On November 12, 2004, Sassaman filed a motion to withdraw and requested a thirty day continuance to allow Carson to obtain new counsel. The ALJ concluded Carson had failed to demonstrate just cause for filing a motion for continuance just four days prior to the scheduled hearing. Accordingly, the ALJ denied the motion and ordered both parties to appear at the hearing on November 16, 2004.

At the hearing, Carson's new counsel, Peter Leyh, renewed the motion for a continuance. The ALJ heard conflicting testimony from Samango and Sassaman, and then credited Sassaman's version of events. He concluded that "prior to April 4, 2004, Mr. Samango was aware of the strategy to limit Carson's defense to the claim that employees of Carco . . . were exposed to hazards . . . ." Finding it contumacious that Samango nonetheless waited until November 12 to disavow the admissions, the ALJ again concluded Carson had not shown good cause for its late filing of a motion for continuance. Accordingly, the ALJ denied the motion and ordered the hearing to proceed.

Carson withdrew from the proceedings. The ALJ entered a judgment of default against Carson in the amount of the

fines and penalties proposed in the original citations–$176,000. The Commission denied Carson's petition for review, and the ALJ's decision became the Commission's final order. Carson appeals the order, challenging the ALJ's denial of a continuance and entry of default against Carson.

II.

We review the ALJ's denial of a continuance and entry of default for abuse of discretion. *See United States v. Fisher*, 10 F.3d 115, 117 (3d Cir. 1993) (continuance); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 919 (3d Cir. 1992) (judgment of default). We ask whether the ALJ acted reasonably in light of the facts presented, not whether we would have reached the same conclusion in the first instance. *See Yeboah v. United States DOJ*, 345 F.3d 216, 223 (3d Cir. 2003).

The ALJ's findings of fact will be conclusive if they are supported by substantial evidence on the record, considered as a whole. 29 U.S.C. § 660(a). Legal conclusions will be set aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See E & R Erectors v. Sec'y of Labor*, 107 F.3d 157, 160 (3d Cir. 1997).

III.

Carson contends the ALJ abused his discretion and infringed upon Carson's due process rights in denying Carson a continuance. The Commission's rules provide that a motion to postpone, received less than seven days prior to a hearing, will generally be denied unless good cause is shown for late filing. *See* 29 C.F.R. § 2200.62(c). Carson contends its need for new counsel constituted good cause. We note substitution of counsel sometimes justifies a continuance. *See* Secretary of

Labor v. Hern Iron Works, Inc., 1989 OSAHRC LEXIS 37, 13 O.S.H. Cas. (BNA) 2186, *2 n.1 (1989). But we conclude the ALJ did not abuse his discretion or deny Carson due process of law by determining that here, it did not.

The ALJ noted the Secretary of Labor prepared her case in reliance on the order conclusively establishing Carson's admissions. Granting the continuance would unduly delay the proceedings by necessitating additional discovery in order to prove the underlying allegations.[2] The ALJ also noted granting a continuance might prejudice the Secretary of Labor, because the compliance officer might be unavailable to testify in a month's time due to back surgery. In light of the undue delay and potential prejudice, the ALJ concluded Carson's desire for new counsel, not acted upon until four days prior to the hearing, did not constitute good cause.[3]

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[2] Carson contends the ALJ could have granted the continuance without allowing Carson to withdraw the admissions, in which case additional discovery would not be needed. Carson never suggested this course to the ALJ. Furthermore, Leyh repeatedly emphasized that Carson could not move forward on the basis of a record in which it admitted the alleged violations. Accordingly, it was reasonable for the ALJ to conclude additional discovery would have been necessary.

[3] Carson notes Sassaman was instructed to obtain a continuance on Tuesday, November 9, but waited until Friday to file the motion. Since we accept the ALJ's determination that Samango became aware of the admissions well in advance of the November meeting, we conclude he had plenty of time to obtain new counsel. He cannot avoid responsibility for the late filing by alleging negligence on the part of Sassaman.

At the hearing on November 16, 2004, Carson renewed its motion for a continuance. The ALJ heard conflicting testimony from Sassaman and Samango and concluded Sassaman's was credible, while Samango's was not.[4] Because the ALJ had the opportunity to observe the demeanor and hear the testimony of both witnesses, we accept his credibility determination. *See Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718 (3d Cir. 2001). We also accept the ALJ's inference--based on his credibility determination and supported by substantial evidence--that Samango was aware of the admissions well in advance of his November 9 meeting with Sassaman. It is unlikely Sassaman filed discovery responses without consulting Carson's president, or failed to inform the president of the order conclusively establishing Carson's responses to the requests for admission. Furthermore, the record supports Sassaman's testimony that he copied Samango on the filed responses to the requests for admission.

Taking into account these circumstances, in addition to the fact that witnesses had been subpoenaed and were present for the hearing, the ALJ concluded a continuance would

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[4] The ALJ stated:

> I do not credit [Samango's] testimony, as it requires one to accept either of two very unlikely scenarios. Either Mr. Sassaman acted as a "rogue" representative, making major litigation decisions and filing significant documents without informing his client, or the president of a company facing several OSHA citations with substantial penalties was totally incurious or completely oblivious to a serious matter facing his company. In contrast, having observed Mr. Sassaman's demeanor, I found his testimony to be both credible and consistent with common experience.

necessitate additional discovery and unduly delay the hearings. The ALJ did not abuse his discretion in concluding Carson had not shown good cause, which would justify this delay. Nor did the ALJ infringe upon Carson's due process rights. Carson was afforded an "opportunity to be heard at a meaningful time and in a meaningful manner," *Rogal v. Am. Broad. Cos., Inc.*, 74 F.3d 40, 44 (3d Cir. 1996), and was represented by counsel of its choice. The denial of a continuance did not rise to the level of a due process violation. *See Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964) ("The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process. . . ").

IV.

Carson also contends the ALJ abused his discretion in the entry of default. Before an ultimate sanction like default is appropriate, there must be a clear record of contumacious conduct or prejudice.[5] *See Secretary of Labor v. Sealtite Corp.*, 15 O.S.H. Cas. (BNA) 1130, *4 (1991). A failure to comply with Commission rules and orders aimed at delaying proceedings constitutes contumacious behavior. *See id.* As noted, the ALJ weighed Sassaman's testimony against conflicting testimony from Samango and concluded Samango was aware of Carson's admissions prior to April 4.[6]

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[5] Because we accept the ALJ's finding that Carson's conduct was contumacious, we need not address prejudice to the Secretary of Labor.

[6] Carson contends the testimony shows that a serious misunderstanding developed late in the proceedings between Samango and Sassaman, and not that one witness was lying.

Accepting this conclusion, we believe it was within the ALJ's discretion to characterize Carson's behavior as contumacious. Despite his actual knowledge, Samango never sought to disavow the company's admissions in the months leading up to the scheduled hearing date. Instead, he falsely testified he was unaware of the admission until early November. When viewed in conjunction with his refusal to proceed with the hearing as ordered by the ALJ, we conclude it was not an abuse of discretion to determine that this pattern of misconduct represented an attempt to delay proceedings and expand the scope of contested issues and was, therefore, contumacious.

In light of Carson's contumacious behavior, entry of default was an appropriate response and was not an abuse of discretion. The Commission's rules give the ALJ authority to enter a default order against a party who failed to plead or otherwise proceed as required by the ALJ. *See* 29 C.F.R. § 2200.101. Samango was on notice that the hearing would go forward as scheduled, but refused to take part.[7]

Regardless of the plausibility of Carson's interpretation, we are not reviewing the case *de novo*. We will accept the ALJ's credibility determinations and fact-finding, including inferences, unless substantial evidence shows the ALJ reached the wrong result. *See Am. Iron & Steel Inst. v. OSHA*, 577 F.2d 825, 831 (3d Cir. 1978). We conclude the ALJ's credibility determinations and resulting inferences are reasonable on the record, and supported by substantial evidence.

[7] Carson further contends the ALJ erred by failing to consider lesser sanctions. We question whether this claim was properly preserved for review on appeal. Regardless, an ALJ is not required to consider lesser sanctions where a litigant refuses to participate in a scheduled evidentiary hearing.

V.

For the reasons set forth, we will affirm the order of the Commission.

APPENDIX C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

Office of Executive Secretary
Phone: (202) 606-5400
Fax: (202) 606-5050

OSHRC Docket No. 03-2229

[Filed February, 2005]

SECRETARY OF LABOR,	)
	)
Complainant,	)
	)
v.	)
	)
CARSON CONCRETE CORP.,	)
	)
Respondent	)
	)

NOTICE OF FINAL ORDER

The Petition for Discretionary Review filed by the Respondent in the above cited action was received by the Commission on January 18, 2005. The case was not directed for review. Therefore, the decision of the Administrative Law

Judge became a final order of the Commission on February 17, 2005, Commission Rule 90(d), 29 C.F.R. § 2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j).

ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A PETITION FOR REVIEW WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE. *See* Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660; Fed. R. App. P. 15.

FOR THE COMMISSION

/s/ Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Dated: February 23, 2005

APPENDIX D

Occupational Safety and Health Review Commission
Administrative Law Judge

OSHRC DOCKET NO. 03-2229

[Filed January 14, 2005]

CARSON CONCRETE CORP., and	)
CARCO CONSTRUCTION CORP.	)
	)

ALJ: WILLIAM C. CREGAR, Judge, OSHRC

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). By order dated July 26, 2004, this matter was scheduled for a hearing to commence on November 16, 2004. On Friday, November 12, 2004, Respondents' representative, James Sassaman, moved for a continuance of the hearing date. At a telephone prehearing conference call held, also on November 12, 2004, I denied the motion, finding no good cause for granting the requested continuance. At the commencement of the hearing on November 16, 2004, Respondents' newly-retained attorney, Peter Leyh, moved for reconsideration of the denial of the motion for a continuance; being unfamiliar with the case, he requested an additional 30 days in order to prepare.

I denied Respondents' motion for reconsideration and, following Respondents' refusal to proceed, I granted Complainant's motion to dismiss the notice of contest for failing to defend. *See* 29 C.F.R. § 2200.41(a). This Decision and Order constitutes this tribunal's final disposition of this matter. 29 C.F.R. § 2200.90(a).

Findings of Fact

Procedural History

1. Respondents, Carson Concrete Corporation ("Carson") and Carco Construction Corporation ("Carco") are corporations engaged in business as concrete contractors. They share the same office and place of business located at 625 West Ridge Pike, Bldg. A, Suite 104, Conshohocken, Pennsylvania. Anthony J. Samango, Jr., President/Secretary-Treasurer, is the sole corporate officer of Carson.[1] His son, Anthony J. Samango III, President/Secretary-Treasurer, is the sole corporate officer of Carco. Answer, ¶2. Response to Complainant's Second Interrogatory Nos. 1, 7; Oral Deposition of Anthony J. Samango III, p. 18, lns. 10-13 (Attached to Secretary's Motion to Amend Citations and Complaint to add Carco as a Respondent).

2. From May 12, 2003 to July 2, 2003, the Occupational Safety and Health Administration ("OSHA") inspected Carson's work site in Philadelphia, Pennsylvania. As a result of the inspection, OSHA issued Carson a Citation and Notification of Penalty on November 7, 2003. The total penalties proposed were $176,000.00.

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[1] Hereafter, Anthony J. Samango, Jr. will be referred to as "Mr. Samango."

3. James Sassaman is the Director of Labor Relations of General Building Contractors Association, Inc. On November 14, 2003, Carson, through Mr. Sassaman, responded to the citations with a timely notice contesting the citations, the proposed abatement dates, and the proposed penalties.

4. On February 17, 2004, the Chief Administrative Law Judge designated the case for mandatory settlement proceedings, assigning Judge Covette Rooney as settlement judge. *See* 29 C.F.R. § 2200.120.

5. On February 25, 2004, Complainant served Carson with 24 Requests for Admission. Most of these requested either an admission or a denial that a named individual had been exposed to a hazard as set forth in one of the items identified in the citations and that the individual was employed by Carson. Proposed Govt. Exh. 18A.[2]

6. Prior to April 4, 2004, Mr. Sassaman discussed the case with Mr. Samango. At the November 16, 2004 hearing, the following dialogue occurred:

> Mr. Sassaman: Your Honor, I remember meeting with Mr. Samango for the purpose of going into the discovery. And when I meet with that employer the

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[2] Four proposed exhibits marked for identification as Govt. Exhibits 18A, 18B, 18C and 18D, and referred to by these designations at the hearing, are already a part of the administrative record. They are: Complainant's First Set of Interrogatories, Requests for Admission and Request for Production of Documents (18A); Respondent's Responses to Complainant's Requests for Admission (18B); Complainant's Second Set of Interrogatories and Request for Production of Documents (18C); and Respondent's Discovery Responses (18D).

very first thing I go over is the request for admissions. Why? Because they're usually very straight forward sentences as opposed to the compound labyrinths of interrogatories with their definitions and identified sections.

We went over that stuff. Mr. Samango said, "These are not my employees," I'll grant him that, he's consistent with that theme. However, having practiced in this area as long as I have, I know that one doesn't have the luxury of saying I don't know because the rule for RFA [Requests for Admissions] states that that's not good enough, that you have to do some reasonable inquiry.

We had the OSHA file, I had sent copies of everything. He sat behind his desk. He has a little round table, big pile of papers I kept sending him. I said, "Let's go through the OSHA inspector's notes." The OSHA inspector is like a police officer, he has a police report. I said, "Look, here's [the] citation whatever, here's a photograph of some guy, here's a hazard, here's his notes. It's clear to me just looking at this, assuming this man is documenting what is true, that hazards existed," and I suggested "You have to either admit or deny, we have to do inquiry"...

[The Court]: But let me ask you a question here. Your heard Mr. Samango say that he didn't know anything about these requests for admissions until November 5th [2004].[3]

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[3] Anthony J. Samango, Jr. testified he had not become aware of the Complainant's Requests for Admissions, the motion to admit the

Mr. Sassaman: I don't believe that. Perhaps he has --

[The Court]: Why do you not believe that?

Mr. Sassaman: Because I discussed them with him I went over the RFA's, then the interrogatories, then the request for production.

[The Court]: Was it over the phone or did you --

Mr. Sassaman: In person.

[The Court]: In person. And when was that?

Mr. Sassaman: That was prior to April 4th, late March or early April. Whenever the discovery was filed he was copied on the finished product.

[The Court]: When was he copied on the finished product?

Mr. Sassaman: When they went out the door to Judge Rooney and Mr. Neely. I always copied him.

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responses, or the order granting the motion until November 5, 2004. (Tr. 18-19). I do not credit his testimony, as it requires one to accept either of two very unlikely scenarios. Either Mr. Sassaman acted as a "rogue" representative, making major litigation decisions and filing significant documents without informing his client, or the president of a company facing several OSHA citations with substantial penalties was totally incurious or completely oblivious to a serious matter facing his company. In contrast, having observed Mr. Sassaman's demeanor, I found his testimony to be both credible and consistent with common experience.

[The Court]: Did he respond back?

Mr. Sassaman: No.

(Tr. 29-31).

7. On April 12, 2004, Carson, through Mr. Sassaman, responded to Complainant's Requests for Admission. The typical response was: "Admitted in part and denied in part, employment relationship denied."

8. A mandatory settlement conference, held on June 28, 2004, did not result in a settlement. Accordingly, the Chief Administrative Law Judge reassigned this case to the undersigned on June 29, 2004.

9. By my order of June 29, 2004, the matter was set for hearing to commence on Tuesday, November 16, 2004. On July 23, 2004, the parties submitted a joint recommendation for pretrial scheduling acknowledging the scheduled hearing date. On July 26, 2004, I issued an order setting forth dates for the completion of discovery, the filing of motions, etc. This order reiterated the November 16, 2004, hearing date.

10. On August 27, 2004, Complainant moved for an order that Carson's responses to her Requests for Admission be conclusively established. Carson did not oppose the motion, and I granted the motion on October 5, 2004. This order preserved the issue of whether Carson employed the employees exposed to the various hazards.

11. On October 8, 2004, Complainant moved for an order to amend the citations and complaint to add Carco as a Respondent. No opposition to the motion was filed, and I granted the motion on October 26, 2004. Throughout these

proceedings, Mr. Sassaman purported to represent Carco in addition to Carson.

12. On November 5, 2004, counsel for Complainant submitted to the court what he and Mr. Sassaman had agreed upon as their joint pre-hearing statement. However, this document was not signed by Mr. Sassaman.

13. On Friday, November 12, 2004, Mr. Sassaman filed a motion to be relieved as representative and for a continuance to permit Respondents to obtain a new representative. The motion states that on November 9, 2004, Mr. Samango met with Mr. Sassaman and disavowed the responses to Complainant's Requests for Admission and ordered him to not sign the joint pre-hearing statment. Complainant opposed the motion, claiming that Respondents failed to demonstrate good cause. On November 12, 2004, the parties argued their respective contentions at a conference call among the undersigned, counsel for Complainant, and Mr. Sassaman. Counsel for Complainant stated that the issue of whether it was Carsons's or Carco's employees that were exposed to the various alleged hazards was discussed during the settlement negotiations and that the issue of whether the violations occurred was not in issue. At the conclusion of the conference call I denied the motion, finding that it was not supported by a sufficient showing of good cause. I ordered Mr. Sassaman to continue as representative and to be present at the hearing.

14. At the beginning of the hearing on November 16, 2004, Peter Leyh appeared on behalf of Respondents and moved for reconsideration of the denial of the postponement. He requested an extension of 30 days to become familiar with the case and to prepare for hearing. Complainant's counsel opposed the motion, noting he was prepared to proceed, having subpoenaed witnesses who were present; he also noted

that one of the witnesses, the OSHA compliance officer, faced back surgery in the next few months. (Tr. 23).

15. I denied the motion for reconsideration, after which Respondents refused to proceed. Complainant then moved for dismissal of the Notice of Contest for failure to obey rules pursuant to 29 C.F.R. § 2200.41(a). I granted the motion.

The Violations

The following are the alleged violations, as amended:[4]

1. On May 12, 2003, an employee of Carson and/or Carco was exposed to a fall from the 17th floor of the worksite while patching an exterior wall and was not protected by a guardrail system, safety net system or personal fall arrest system. Admission No. 1.

2. On May 13, 2003, Cecil Hawkins, an employee of Carson and/or Carco, was installing a guardrail system and was exposed to a two story fall while going to and from his work area and was not protected by a guardrail system, safety net system, or personal fall arrest system. Admission No. 2.

3. On May 12, 2003, Arthur Maycontonio, an employee of Carson and/or Carco, was exposed to a fall of approximately nine feet while constructing the leading edge of the form work above the 20th floor and was not protected

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[4] The citations state, and it is admitted, that from at least May 12, 2003 though July 2, 2003, Respondents had a workplace at 8th and Walnut Streets, Philadelphia, Pennsylvania, and that from May 12, 2003 through July 2, 2003, an authorized representative of the Secretary of Labor inspected the workplace. Answer, ¶¶2, 6.

from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 3.

4. On May 12, 2003, Bill McHale, an employee of Carson and/or Carco, was exposed to a fall of approximately nine feet while constructing the leading edge of the form work above the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 4.

5. On May 12, 2003, Tracy Lanjity, an employee of Carson and/or Carco, was exposed to a fall of approximately nine feet while bracing a wall form to enclose an opening on the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 5.

6. On May 12, 2003, an employee of Carson and/or Carco was exposed to a fall of approximately nine feet while enclosing an opening during the construction of the leading edge of the form work above the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 6.

7. On May 12, 2003, Dwain Hayter, an employee of Carson and/or Carco, was exposed to a fall of approximately nine feet while constructing the leading edge of the form work above the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 7.

8. On May 12, 2003, an employee of Carson and/or Carco was exposed to a fall of approximately 9 feet while waiting

for the Peri form pans to be delivered by a tower crane, and the employee was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 8.

9. As of May 13, 2003, Respondents Carson and/or Carco did not provide a fall protection training program to all of their employees who were exposed or who may have been exposed to fall hazards, including the following employees: Arthur Maycontonio, Bill Blackla, Jerome Ingram, Tom Elchner, and Charles Hollis. Admission No. 9.

10. On May 13, 2003, Charles Hollis, an employee of Carson and/or Carco, utilized a Bosch chipping gun to chip excess cement from interior walls at the worksite and was not provided with eye or face protection to protect against potential injuries to his eyes or face. Admission No. 10.

11. On May 13, 2003, Jim Nelson, an employee of Carson and/or Carco, stood on the top step of a Green Bull step ladder while installing a ring on a vacuum. Admission No. 11.

12. On May 12, 2003, Carson and/or Carco did not keep all employees clear of suspended loads as two bundles of steel braces (multi props) were lifted over the employees working on the 20th floor. Admission No. 12.

13. On May 12, 2003, Carson and/or Carco did not ensure that the attachment point of body harnesses were located in the center of the wearer's back near shoulder level as Bill Blackla, an employee of either Carson and/or Carco, utilized a Miller personal fall arrest system with the self-retracting life line attached to his side belt harness. Admission No. 13.

14. On May 12, 2003, Carson and/or Carco did not inspect the Miller personal fall arrest system for damage prior to employee Bill Blackla utilizing the fall arrest system on that day. Admission No. 14.

15. On May 13, 2003, Tom Elchner, an employee of Carson and/or Carco, utilized the cross bracing of the PERI system, which is incapable of withstanding 5,000 pounds, as an anchorage point while installing a toeboard on the 20th floor. Admission No. 15.

16. On May 13, 2003, toeboards or equivalent protection were not provided at the edge of a platform on the 20th floor where employees on the 19th floor were exposed to objects such as wood, concrete, and nails falling from above. Admission No. 16.

17. On May 13, 2003, toeboards or equivalent protection were not provided on the floor edges of both the east side and west side of the 20th floor and employees working below the 20th floor were exposed to falling debris. Admission No. 17.

18. On May 12, 2003, employees of Carson and/or Carco were exposed to two unprotected floor holes, measuring 33 inches by 14 inches and 31 inches by 14 inches respectively, adjacent to the automatic climbing jacks on the 20th floor. Admission No. 18.

19. On May 13, 2003, employees of Carson and/or Carco were exposed to an unprotected floor hole, measuring 33 inches by 27 inches, adjacent to the automatic climbing jack on the west side of the 20th floor. Admission No. 19.

20. On May 12, 2003, Carson and/or Carco utilized nylon slings with broken and worn stitches to lift a bundle of steel bracing (multi-props) on the 20th floor. Admission No. 20.

21. On May 12, 2003, Carson and/or Carco utilized nylon slings to lift a bundle of steel bracing (multi-props) on the 20th floor which were not marked with the name or trademark of the manufacturer or the rated capacities for the type of hitch and the type of sling material. Admission No. 21.

22. On May 12, 2003, Carson and/or Carco utilized nylon slings with broken and worn stitches to lift a bundle of steel web bracing (MRK frames) on the 18th floor. Admission No. 22.

23. On May 12, 2003, Carson and/or Carco utilized nylon slings to lift a bundle of steel web bracing (MRK frames) on the 18th floor which were not marked with the name or trademark of the manufacturer or with the rated capacities for the type of hitch and the type of sling material. Admission No. 23.

24. On May 12, 2003, Carson and/or Carco did not have a competent person inspect for damage or defects to the nylon slings that were used to lift a bundle of steel web bracing (MRK frames) on the 18th floor and the bundle of steel bracing (multi-props) on the 20th floor. Admission No. 24.

Discussion

Denial of Respondents' Motion for Continuance

The Commission's rules regarding postponements of hearings are found at 29 C.F.R. § 2200.62. Specifically, Rules 62(a) and 62(c) provide as follows:

> (a) *Motion to postpone.* A hearing may be postponed by the Judge on his own initiative or for good cause shown upon the motion of a party. A motion for postponement shall state the position of the other parties, either by a joint motion or by a representation of the moving party. The filing of a motion for postponement does not automatically postpone a hearing. (Emphasis added).
>
> (c) *When motion must be received.* A motion to postpone a hearing must be received at least seven days prior to the hearing. A motion for postponement received less than seven days prior to the hearing will generally be denied unless good cause is shown for late filing.

Respondents' motion for a continuance clearly did not meet the seven-day filing requirement set out in Rule 62(c) above. Further, Respondents did not demonstrate good cause either for the late filing under Rule 62(c) or for the postponement under Rule 62(a).[5] The November 16, 2004 hearing date was established on June 29, 2004 and affirmed on July 26, 2004. As set out *supra,* I credited Mr. Sassaman's testimony that he kept Mr. Samango informed about the case, sent him copies of the Complainant's Requests for Admission, and, prior to April 4, 2004, discussed the proposed responses

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[5] The reason for seeking a continuance was for Respondents to obtain a new counsel and to also give the new counsel time to become familiar with the case and prepare for the hearing. However, for the reasons set out *infra,* allowing Mr. Sassaman to withdraw at the last minute and granting a continuance would have been improper. Specifically, it would have unduly delayed the hearing, and it had the potential for prejudicing the Secretary's case. *See* 29 C.F.R. § 2200.23 (b).

with him. Yet Mr. Samango waited until the Friday before the Tuesday scheduled for the hearing to attempt to replace his representative and to disavow the responses to Complainant's Requests for Admission. His claim that he did not see the responses until November 5, 2004 is simply not credible. In addition, the Secretary had prepared her case in reliance upon the October 5, 2004 order conclusively establishing Carson's Responses to the Complainant's Requests for Admission, and witnesses had been subpoenaed and were present for the November 16, 2004 hearing. Mr. Samango's disavowal of the admissions would require the Secretary to prepare for trial on issues she justifiably believed were no longer a part of the case. Granting Respondents' motion for a continuance would necessitate additional discovery and would unduly delay the hearing in this case; granting the motion also had the potential of prejudicing the Secretary's case.[6] For these reasons, I denied Respondents' motion during the telephone conference held on November 12, 2004, and I denied Respondents' motion for reconsideration at the hearing.

Vacation of the Notice of Contest

Following Respondents' refusal to proceed after the denial of the motion for reconsideration of the motion for a continuance, Complainant moved to dismiss the Notice of Contest pursuant to 29 C.F.R. § 2200.41. Commission Rule 41(a) states:

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[6] While I do not find actual prejudice, delaying the hearing clearly has the potential of prejudicing the Secretary's case. The OSHA compliance officer, a key witness, faces back surgery, and at this time it is not possible to count on his availability.

> (a) *Sanctions*. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either: (1) on the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or (2) on the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

Respondents have "failed ... to proceed ... as required by the ... Judge." While extreme, the sanction of vacating the Notice of Contest and entering a default judgment is appropriate under the circumstances of this case. Two interests must be balanced. A party has a strong interest in adjudicating its case on the merits. As a result, defaults are generally disfavored. However, the Commission also has a "strong interest in preserving the integrity of its orders as well as deterring future misconduct." *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1583 n.6 (Nos. 88-1545 & 88-1547, 1991) (citing *Pittsburg Forging Co.*, 10 BNA OSHC at 1514). To make a sufficient showing to overcome the first interest, the Commission has required a demonstration of either prejudice or contumacious conduct. *See, e.g., Samsonite Corp.*, 10 BNA OSHA 1583, 1587 (No. 79-5649, 1982); *Duquesne Light Co.*, 8 BNA OSHC 1218 (No. 78-5034, 1980); *Boardman Co.*, 9 BNA OSHC 1163 (No. 80-75, 1980). *See Pittsburgh Forgings Co., supra* (Cottine, Commissioner, dissenting); *TRG Drilling Corp.*, 10 BNA OSHC 1268 (No. 80-6008, 1981) (Cottine, Commissioner, dissenting).

I conclude that Respondents' belated request for a continuance was contumacious. Prior to April 4, 2004, Mr.

Samango was aware of the strategy to limit Carson's defense to the claim that employees of Carco rather than Carson were exposed to the hazards identified in the citations. The November 16, 2004 hearing date was established on June 29, 2004, and that date was affirmed on July 26, 2004. Claiming that he did not learn of the nature of Carson's defense until November 5, 2004, he waited until November 12, 2004, to disavow it. I find his testimony in this regard to lack credibility and to constitute an expression of contempt for this process. I further find that, under the circumstances of this case, granting Respondents' request would: 1) unjustifiably reward the Respondents; 2) inappropriately require the Secretary to expend additional time and resources in the litigation of this matter; 3) compromise the integrity of the Commission's orders; and 4) encourage future misconduct. I accordingly granted Complainant's motion to dismiss the Notice of Contest at the hearing.

ORDER

1. Serious Citation 1, Items 1a, 1b and 1c, alleging violations of 29 C.F.R. §§ 1926.251(a)(6), 1926.251(e)(1) and 1926.251(e)(8)(iv), respectively, are AFFIRMED, and a total penalty of $1,600.00 is assessed.

2. Serious Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1926.501(b)(4)(ii), is AFFIRMED, and a penalty of $2,800.00 is assessed.

3. Serious Citation 1, Item 3, alleging a violation of 29 C.F.R. § 1926.501(c)(1), is AFFIRMED, and a penalty of $1,600.00 is assessed.

4. Serious Citation 1, Item 4, alleging a violation of 29 C.F.R. § 1926.502(d)(15), is AFFIRMED, and a penalty of $1,200.00 is assessed.

5. Serious Citation 1, Items 5a and 5b, alleging violations of 29 C.F.R. §§ 1926.502(d)(17) and 1926.502(d)(21), respectively, are AFFIRMED, and a total penalty of $1,600.00 is assessed.

6. Serious Citation 1, Item 6, alleging a violation of 29 C.F.R. § 1926.550(a)(19), is AFFIRMED, and a penalty of $4,000.00 is assessed.

7. Serious Citation 1, Item 7, alleging a violation of 29 C.F.R. § 1926.1053(b)(13), is AFFIRMED, and a penalty of $1,600.00 is assessed.

8. Willful Citation 2, Item 1, alleging a violation of 29 C.F.R. § 1926.501(b)(1), is AFFIRMED, and a penalty of $56,000.00 is assessed.

9. Willful Citation 2, Items 2a and 2b, alleging violations of 29 C.F.R. §§ 1926.501(b)(2)(i) and 1926.501(b)(2)(ii), respectively, are AFFIRMED, and a total penalty of $4,000.00 is assessed.

10. Willful Citation 2, Item 3, alleging a violation of 29 C.F.R. § 1926.503(a)(1), is AFFIRMED, and a penalty of $56,000.00 is assessed.

11. Repeat Citation 3, Item 1, alleging a violation of 29 C.F.R. § 1926.102(a)(1), is AFFIRMED, and a penalty of $5,600.00 is assessed.